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In the Supreme Court
OF THE
United States

October Term, 1961

No. 803

Harry P. Locklin and Elmer J. Brant, general partners doing business under the firm name of Radiant Color Company,
Petitioners,

vs.

Switzer Brothers, Inc., a corporation,
Respondent.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners file this reply to clarify certain misconceptions which may have been created by respondent's brief filed in opposition to the petition.

I.

Respondent begs the question presented when it states that the lower courts decided this case in accordance with

35 U.S.C. Sec. 112—whether they did or did not is the very question in issue. The question is whether the statute is met when indefinite functional language is employed in the claim which requires testing and experiment to determine the scope of invention and monopoly.

II.

Respondent's admission that the Lawter litigation was settled out of court underscores petitioners' contention that a further challenge to the Kazenas patent is unlikely.

III.

Respondent states that it is immaterial to the outcome of this case whether or not Section 112 abolished or modified the rule of *Halliburton et al.* Manifestly, if this court decides that rule has not been modified or rendered obsolete by Section 112, the Kazenas claims are invalid because they express the exact point of novelty in admittedly functional language and are wholly indefinite.

IV.

Respondent nowhere advances any reason for failing to set forth in the patent *claims* the critical limits of either melamine or melamine derivatives in precise arithmetical terms. The fact that two examples appearing in the patent specification disclose a limit of melamine *per se,* affords no standard whatsoever for determining the limits of literally hundreds of melamine derivatives claimed within the scope of the Kazenas patent claims. Respondent's suggestion that the "lower" limits of all melamine derivatives were made specific by the two examples cited is unsup-

ported by the record in this case and certainly does not suggest the upper limits of melamine or its derivatives.

V.

The attempted distinction by respondent between language describing function in terms of properties or qualities and function in terms of performance in intended end use is specious. No cases make the distinction and respondent cites none. The question is not to categorize the type of functional language but rather the question is whether the functional language renders the claim so indefinite that it fails to clearly set forth the bounds of the claimed invention and monopoly.

VI.

The respondent quotes a stipulation by petitioners that its resin would infringe the patent if valid. Such a stipulation concerning possible infringement is by no means an admission of validity and any inference to the contrary is incorrect.

VII.

Respondent concedes that "preliminary tests may be necessary to determine the lower limits of the melamine component needed to give aromatic hydrocarbon insolubility". This is to admit that tests are necessary to determine the actual scope of the invention as claimed, i.e., the point where insolubility in aromatic hydrocarbons is obtained. Respondent fails to mention that testing is also required to determine the amount of melamine that will be "insufficient" to make the resin thermosetting as required by the patent claims. Further, each of the many

hundreds of melamine derivatives encompassed by the claims has its own critical limits and these limits can only be determined by individual testing. All this is a far cry from preliminary testing required to secure "best results" as permitted in the *Minerals Separation* case mentioned by respondent.

April 11, 1962.

Respectfully submitted,

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